Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT NAST,

v.

NEW JERSEY TRANSIT RAIL OPERATION, INC.,

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a plaintiff in a Federal Employers' Liability Act (45 USCS § 51 et seq.) case have an obligation to mitigate his damages?

LIST OF PARTIES TO THE PROCEEDING

The petitioner, which was the defendant in the state court action below, is New Jersey Transit Rail Operations, Inc. The respondent, who was plaintiff in the state court action below, is Robert Nast.

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The unpublished Memorandum Opinion of the Superior Court of Pennsylvania dated July 23, 2001, is reproduced at page 17a of Appendix D.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was filed by the Supreme Court of Pennsylvania on February 12, 2002, in response to petitioner's Petition for Allowance of Appeal from an Order of the Superior Court of Pennsylvania.

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a) which permits review by Writ of Certiorari of a final judgment rendered by the highest court of a state in which a decision could be had where any "title, right, privilege, or immunity is specifically set up or claimed under the ...statutes of ... the United States."

STATUTORY PROVISIONS INVOLVED

I. 45 U.S.C.S. § 51

Every common carrier by railroad while engaging in commerce between any of the several States of Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any

way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) (45 USCS § 51 et seq.)

STATEMENT OF THE CASE

Petitioner, New Jersey Transit Rail Operations, Inc., respectfully seeks the grant of its Petition for a Writ of Certiorari from a final judgment entered by the Supreme Court of Pennsylvania on February 12, 2002, denying petitioner's Petition for Allowance of Appeal.

This Petition arises from a jury trial, which took place in the Philadelphia County Court of Common Pleas in July of 1999. Plaintiff, Robert Nast, an employee of petitioner, sued petitioner pursuant to the Federal Employers' Liability Act, (45 USCS § 51 et seq.) as a result of a work place accident that occurred on April 7, 1997. According to the testimony which developed at trial, petitioner's Raritan yard in Raritan, New Jersey, was being resurfaced and the work involved excavating and elevating the ground level at the yard and replacing ties and ballast. Plaintiff, a machinist, testified that on the day of his accident, his duties involved inspecting rail cars. In order to get to the cars for inspection, he walked through the yard, part of which was being resurfaced. After inspecting one of the cars, plaintiff descended a ladder on the side of the car and, according to his testimony, stepped into a trench causing him to slip off the ladder and fall. As a result of this fall, plaintiff claimed to have sustained an injury to his back which, according to his physician, prevented him from returning to his former job on the railroad.

Because one of plaintiff's claimed elements of damages was diminution in earning capacity, plaintiff called a vocational expert and an economist to testify as to the present value of the difference between his post-accident earning capacity and his pre-accident earning capacity. However,

through discovery, defendant learned that plaintiff had been involved in a side business, namely putting on firework shows throughout the central and northern New Jersey region. Defendant served plaintiff's counsel with a Notice to Produce Documents relevant to plaintiff's business and income prior to trial, but plaintiff's counsel objected, and the trial court sustained the objection. Furthermore, the trial court severely circumscribed the extent to which defense counsel could question plaintiff about his business at the time of trial. Consequently, the jury learned almost nothing about plaintiff's source of alternate income, which is relevant in a case where diminution of earning capacity is a claimed element of damages.

After the jury returned a verdict in the amount of $3,000,000.00, an amount that defendant claimed to be excessive (and with which the trial court ultimately agreed), defendant filed post-trial motions, alleging, among other things, that the trial court had committed an error of law and/or abuse of discretion in denying defense counsel the opportunity to question plaintiff thoroughly about his side business. The trial court denied that portion of the post-trial motion, but did grant defendant's alternate Motion for Remittitur. Plaintiff's counsel appealed to the Superior Court of Pennsylvania from the decision granting Remittitur, and defendant then cross appealed on the trial court's evidentiary ruling concerning the alternate income. In affirming the trial court's decision on the evidentiary issue, the Superior Court of Pennsylvania wrote that plaintiff was not required to mitigate his damages, which is an incorrect statement of the law of damages as it relates to a Federal Employers' Liability Act case. Furthermore, the Superior Court incorrectly stated

that plaintiff's income from a side business was irrelevant since he was not claiming a diminution of his capacity to earn that income. However, since plaintiff was claiming an overall diminution of earning capacity, any income that he earned is relevant and should have been explained to the jury.

Petitioner then applied to the Superior Court of Pennsylvania for re-argument before a court *en banc*. Petitioner's application was denied by the Superior Court of Pennsylvania by Order dated September 27, 2001. Petitioner then petitioned the Supreme Court of Pennsylvania for Allowance of Appeal. The Supreme Court of Pennsylvania denied petitioner's Petition by Order dated February 12, 2002, and it is from that Order which petitioner files the instant Petition for Writ of Certiorari.

ARGUMENT

Petitioner appealed from a trial court ruling that its proposed questions regarding plaintiff/respondent's alternate source of income were irrelevant. In affirming the trial court with respect to this ruling, the Superior Court of Pennsylvania wrote that there is no requirement for a plaintiff to mitigate his damages. Specifically, the Superior Court of Pennsylvania wrote that "as to the railroad's claim that the business records went to mitigation of damages, we are aware of no requirement that a plaintiff in a negligence case mitigate his damages. Rather, mitigation of damages is required in cases involving breach of contract."

It is respectfully suggested that this is a misstatement of the law, specifically, as it relates to a Federal Employers' Liability Act case. Various Federal Appellate Courts throughout the country which have addressed this issue have either held or stated in dicta that a plaintiff in a Federal Employers' Liability Act case is required to mitigate his damages. For example, the Third Circuit Court of Appeals, which encompasses the three judicial districts of Pennsylvania, has recently restated the long standing requirement that a plaintiff in a Federal Employers' Liability Act case mitigate his damages. In the case of *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3rd Cir. N.J. 1995) the court held that "under the FELA, which is to be interpreted according to general principles of law as administered in the federal courts ... an injured plaintiff has a duty to mitigate his damages" *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1288 (3rd Cir. N.J. 1995). The Third Circuit relied upon the Sixth Circuit case of *Jones v. Con-*

solidated Rail Corporation, 800 F.2d 590 (6th Cir. Ohio 1986). In addition to these two circuit courts, petitioner is aware of at least four other circuits which have stated that a plaintiff in an FELA action is required to mitigate damages. The Second Circuit, in the case of *Schneider v. National Railroad Passenger Corporation*, 987 F.2d 132 (2nd Cir. Conn. 1993), also quoting the case of *Jones v. Consolidated Rail Corporation*, 800 F.2d 590 (6th Cir. Ohio 1986), stated that a plaintiff in an FELA lawsuit is required to mitigate damages, *Schneider v. National Railroad Passenger Corporation*, 987 F.2d 132, 136 (2nd Cir. Conn. 1993). Similarly, the Seventh Circuit Court of Appeals also recognizes that a plaintiff in an FELA action has a duty to mitigate his damages. In the case of *Russell v. National Railroad Passenger Corporation*, 189 F.3d 590 (7th Cir. Ill. 1999) the court found no harm in a jury charge which specifically stated that the jury is "to consider that an injured person is under a duty to mitigate his damages, that is, to minimize the economic loss resulting from her injury by resuming gainful employment as soon as such can be reasonable done." *Russell v. National Railroad Passenger Corporation*, 189 F.2d 590, 596 (7th Cir. Ill.1999). The Seventh Circuit recognized that "a plaintiff certainly has a duty to mitigate her damages under these circumstances." *Russell v. National Railroad Passenger Corporation*, 189 F.3d 590, 596 (7th Cir. Ill. 1999). The Eighth Circuit Court of Appeals has also addressed the issue of mitigation of damages and has followed the *Jones v. Consolidated Rail Corporation* standard. In the case of *Bissett et al. v. Burlington Northern Railroad Company*, 969 F.2d 727 (8th Cir. Minn. 1992), the court affirmed a trial court ruling concerning, among other things, a jury charge on

mitigation of damages. The court, citing with approval language from *Jones v. Consolidated Rail Corporation*, concluded that evidence concerning alternate employment available to both plaintiffs in that action was properly admissible to show that plaintiffs failed to mitigate their damages. Finally, the Tenth Circuit Court of Appeals has also addressed the issue of mitigation of damages and reached a similar result. While the court in the case of *Wilson v. Union Pacific Railroad Company*, 56 F.3d 1226 (10th Cir. Colo. 1995) did not find that defendant offered sufficient evidence to demonstrate failure to mitigate, by its language, it demonstrated its acceptance that, in proper circumstances, mitigation of damages is an acceptable and appropriate defense. The court wrote that "an unemployed plaintiff who is able to look for work does not satisfy his duty to mitigate by waiting passively for employment to be offered. The opportunity to mitigate is not merely the opportunity to accept a job, but the opportunity to seek appropriate work when one is able to do so. If that opportunity is shown to have existed, the issue of mitigation should not normally be prevented from reaching a properly instructed jury." *Wilson v. Union Pacific Railroad Company*, 56 F.3d 1226, 1232 (10th Cir. Colo. 1995).

Petitioner is aware of no Circuit Court cases in which the court has held that a plaintiff in an FELA action is not required to mitigate his damages. Likewise, petitioner is aware of no cases in which the Supreme Court of the United States has addressed this issue. Therefore, it is the position of petitioner that the Supreme Court of Pennsylvania, in denying petitioner's Petition for Review in a case where the Superior Court of Pennsylvania wrote that a plaintiff in an FELA lawsuit is not required to mitigate his damages, has taken a po-

sition which is contrary to the position of the Circuit Courts which have addressed this issue and therefore petitioner respectfully requests this Honorable Court to grant its Petition for Writ of Certiorari pursuant to Supreme Court Rule 10(b). In the alternative, since this is an important question of federal law which has not yet been, but should be, settled by this Honorable Court, petitioner also seeks review pursuant to Supreme Court Rule 10(c).

CONCLUSION

The undersigned respectfully requests that this court grant Certiorari in this matter for the reasons stated above.

Respectfully submitted,

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APPENDIX

APPENDIX A- ORDER DATED AUGUST 23, 1999 FROM THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL DIVISION

ROBERT NAST	:	
	:	JUNE TERM, 1998
v.	:	
	:	NO. 3111
NEW JERSEY TRANSIT	:	
RAIL OPERATONS, INC.	:	

ORDER

AND NOW, this 23rd day of August, 1999, upon consideration of Defendant, New Jersey Transit's Motion for Post Trial Relief and Plaintiff's response thereto, this Court finds that the award of damages by the jury to Robert Nast for injuries incurred at the Raritan Rail yard in the amount of Three Million Dollars ($3,000,000.00) bore no reasonable relationship to the damages set forth at trial, but rather reflects passion or prejudice by the jury.

Accordingly, it is hereby ORDERED and DECREED that remittitur is GRANTED and the award is modified to Five Hundred Thousand Dollars ($500,000.00).

BY THE COURT:

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WOLF, J.

APPENDIX B – ORDER DATED SEPTEMBER 22, 1999 FROM THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS

ROBERT NAST	:	
v.	:	JUNE TERM, 1998
	:	
NEW JERSEY TRANSIT	:	NO. 3111
RAIL OPERATIONS, INC.	:	
	:	

ORDER

AND NOW, this 22nd day of September 1999, upon consideration of Plaintiff's request for reconsideration, it is hereby ORDERED that the Order of this Court entered on August 23, 1999 is hereby VACATED.

It is further ORDERED that Defendant's post-trial motion for a new trial is DENIED. However, the request for remittitur is GRANTED and the award is modified to Five Hundred Thousand Dollars ($500,000.00). Either party may reject this modified judgment and demand a new trial or file an appeal to the Superior Court of Pennsylvania. This is a final Order of the Court.

BY THE COURT:

WOLF, J.

APPENDIX C- OPINION DATED OCTOBER 12, 2000 FROM THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY – CIVIL TRIAL DIVISION

Robert Nast	:	JUNE TERM, 1998
v.	:	
	:	
New Jersey Transit Rail Operations, Inc.	:	NO. 3111
	:	

OPINION

WOLF, J. October 12, 2000

Robert Nast ("Plaintiff") and the New Jersey Rail Operations, Inc., ("Defendant) have filed cross appeals of this Court's Order of September 22, 1999 denying Defendant's Motion for a New Trial, but granting its request for remittitur, thereby reducing the jury award in favor of Plaintiff from $3,000,000.00 to $500,000.00.

FACTS

Plaintiff has been employed by New Jersey Transit Rail Operations ("Defendant") since 1983 as a machinist. N.T. 7/12/99 at 63, 67.[1] In that capacity, Plaintiff was in charge of inspection, testing, maintenance, and repair of engines, locomotives and buildings at various railyards to which he was assigned. *Id.* On April 7, 1997, while working at the Raritan Rail Yard (hereinafter "Raritan Yard" or "Yard") Plaintiff suffered injuries when he fell exiting a train car. *Id.* at 70.

At the time of the incident, the Raritan Yard was being resurfaced, *Id.* at 44, which entailed excavating and elevating the ground level at the Yard and replacing ties and ballasts. *Id.* at 44. This work caused a temporary deterioration of the surface conditions in the Yard, creating numerous holes and uneven ground surfaces. These conditions, coupled with already existing poor or inadequate lighting, constituted a dangerous workplace. *Id.* at 46. Plaintiff made constant complaints to his foreman about the conditions of the Yard, *Id.* at p. 89, as did ten to fifteen other employees. *Id.* at 46,

[1] Plaintiff had also owned and operated a fireworks business on the side for a number of years before the accident. *Id.* At 98. This business not only sold fireworks, but also put on fireworks displays. *Id.* At 99. Prior to his injury, Plaintiff worked at this business part-time, loading trucks, lifting boxes, handling accounts and putting on the actual displays. *Id.* Since the accident, Plaintiff is limited to designing the programs. *Id.* at 100.

48. However, Defendant did nothing to address the safety concerns. *Id.* at 49.[2]

At trial, Plaintiff testified as follows. On April 7, 1999, he began work at 3 p.m. and worked through the night shift in order to pick up overtime hours. *Id.* at 70. That night, Plaintiff's duties included inspecting rail cars. *Id.* at 71. In order to get to the trains, Plaintiff had to walk through the Yard which at that time, as part of the resurfacing project was marked by two-foot trenched. *Id.* at 72. After inspecting one of the cars, Plaintiff attempted to exit the train. Keeping both hands on the railing, Plaintiff climbed down a ladder on the side of the car until he felt the ground under one foot. *Id.* at 74. As Plaintiff reached with his other foot to place it on the ground, he found a void, leaving him with no place to stand. *Id.* Plaintiff then slipped off the ladder and fell into one of the two-foot trenched below. *Id.* at 74-75. In explaining his fall, Plaintiff testified that, unlike the flashlights that were provided to conductors, which fastened to the arm and allowed the conductor to look down before stepping dow: 'o the ground, *Id.* at 81, the hand-held flashlight that he had been given was of no help when descending from the train because he had to use both hands to hold on to the lad-

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[2] In addition to evidence concerning the poor conditions at the Yard, Plaintiff presented testimony regarding Defendant's lack of concern for the safety of its employees. *Id.* at 69. For example, Defendant failed to explain proper safety rules to its personnel, *Id.* at 69, failed to discuss proper safety procedures at the yard to its employees, *Id.* and failed to give notice as to the improvements or resurfacing. *Id.*

der.[3] *Id.* Thus, Plaintiff argued, if the machinist had been given flashlights similar to those issued to conductors, this accident could have been avoided. *Id.*

After the fall, Plaintiff experienced mild pain which persisted for the remainder of his shift. *Id.* at 85. Although Plaintiff did not report his fall immediately, when the pain worsened, Plaintiff did tell his foreman about the accident the following day. *Id.* Plaintiff was told to see the company physician, Dr. Rowe, who directed him to take two aspirin and go back to the Yard. *Id.* at 86. For the next week, Plaintiff continued to work with pain. Finally, Plaintiff complained again the following week. *Id.* at 87. Again, Dr. Rowe examined Plaintiff, found damage to his nerve and foot, and took Plaintiff off of service. *Id.*

Thereafter, Plaintiff began a therapy program which failed to alleviate his pain. *Id.* at 92. In fact, during this time, the pain worsened , *Id.* at 93, extending from his lower back, down is right leg, and over to the front of his knee. *Id.* Plaintiff underwent a myelogram which revealed the existence of nerve damage. *Id.* Since that time, Plaintiff has treated with Dr. Giriwarlal Gupta ("Dr. Gupta"), a board certified neurologist who diagnosed Plaintiff as suffering from lumbar

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[3] Thomas Lawson, an electrician employed by Defendant, testified that although he was not working at the Yard on the day of Plaintiff's fall, the lighting in the Yard during the two months immediately prior to the fall was completely inadequate. *Id.* at 60. Specifically, the only lighting available at the time were 50-watt lights near each of the rail car's forty-inch wheels. *Id.* at 57. As a result, to provide illumination during nighttime inspections, each machinist was given one hand-held flashlight. *Id.* at 50.

radicular pain and damage to the nerve roots coming out of the spine. Trial Deposition of Dr. Giriwarlal Gupta a 9 (hereafter "Tr. Dep. of Dr. Gupta"). Plaintiff also began to lose some feeling in his right lower limb (i.e., dull on pin-prick) (Tr. Dep. of Dr. Gupta at 16), specifically his calf and outer portion of his right foot. Trial Deposition of Dr. Stephen Gollomp at p.17. In January of 1998, Plaintiff stated that the pain had begun to radiate from his back down his right leg and up through his toes (Tr. Dep of Dr. Gupta at 16), which is known as "right-sided sciatica." Plaintiff has been attempting to manage the pain with Tegretol. *Id.* at 94. While this medication has taken the edge of his pain, Plaintiff complains that it makes him tired and drowsy, *Id.* at 94, and causes him to suffer from headaches and diarrhea. (Tr. Dep. of Dr. Gupta at p.9). Even with the help of the medication, it is likely that the pain will linger for a long time--perhaps permanently. (Tr. Dep. of Dr. Gupta at 25). Moreover, Plaintiff can no longer perform the function of his former occupation as a machinist with New Jersey Transit Rail. (Tr. Dep. of Dr. Gupta at 24).

As of the date of trial, Plaintiff who had been the sole provider to his wife and four children, N.T. 7/12/99 at p. 100 had been unable to gain employment, N.T. 7/13/99 at 15, and had limited his involvement with his fireworks business to administrative duties. N.T. 7/12/99 at 100. Moreover, due to his injuries, Plaintiff is unable to apply his skills as a mechanic, and therefore, his choices are limited to those unskilled jobs that don't require long periods of sitting, standing or walking, or lifting., *Id.* at 18. However, although Plaintiff is unable to lift a significant amount of weight, *Id.* and has limited ability to stand, Dr. Gupta stated that he

should be able to perform a sedentary job, e.g. office work, where he does not have to do bending, twisting or lifting. (Tr. Dep. of Dr. Gupta at p. 24).

Plaintiff also claims to have trouble doing all the things that he used to do with his children, *Id.* at 95. His youngest daughter, Kelly can't cuddle up with her father, can't sleep with him in bed, can't wrestle or play ball with him, and Plaintiff cannot go to any of her sports activities. *Id.* at 138. His oldest son, Bobby, took a semester off from college to help the family with bills and to do the heavy work for the fireworks business. *Id.* at 100. Plaintiff has been frustrated by his chronic pain and he has grown depressed. N.T. 7/12/99 at 139.

To determine the value or amount of financial loss that has been and will be suffered Plaintiff presented the testimony of Dr. Andrew Verzilli, a professor of economics at Drexel University. N.T. 7/13/99 at 55. Dr. Verzilli testified that prior to the accident, Plaintiff's income was just over seventeen (17) dollars per hour. *Id.* at 69. In 1995, he earned $40,900; in 1996, he earned $34,000; and before this incident in April 1997, he had already earned $22,000. *Id.* at 69-70. Thus, assuming an average salary between $ 30, 000 and $40,000 each year until retirement between the ages of 65 and 70 years old, Plaintiff will lose at least $369,000 but not more than $723,000 due to his injury. *Id.* at 76.[4]

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[4] These figures represent the net salaries to be earned, taking into consideration the taxes and other deductions to be paid, and using an interest rate for investment purposes of four (4) percent. *Id.* at 75.

A three (3) day jury trial was held on July 12 through July 14, 1999. After deliberation, the jury returned a verdict finding Defendant negligent and assessing damages against Defendant in the amount of $3,000,000.00. Thereafter, on July 20, 1999, Defendant filed timely post-trial motions, asking the court to either grant a new trial, or grant remittitur. On September 22, 1999, this Court denied Defendant's request for a new trial but granted remittitur, reducing the amount of the award to $500,000.00.

On October 14, 1999, Plaintiff filed an appeal of the September 22, 1999 Order. On October 28, 1999, Defendant filed its cross-appeal. In his Concise Statements of Matters Complained of On Appeal filed by the parties, Plaintiff asserts that the Court committed error in granting remittitur. In the Concise Statement of Matters Complained of on Appeal by Defendant, Defendant complains that:

1. Even after the grant of remittitur, the amount of the damages awarded to Plaintiff is excessive;

2. The Court committed an error of law in allowing the use of a photograph alleged to be prejudicial;

3. The Court committed and error of law or abuse of discretion in not requiring Plaintiff to produce business records related to his fireworks business, or permitting Defendant to submit the records into evidence;

4. The Court committed an error of law or abuse of discretion in giving Plaintiff's Requested Point for Charge No. 16.

For the reasons set forth below, the decision of this Court should be disturbed.

DISCUSSION

Judicial reduction of a jury award is appropriate only when the award is clearly excessive. *Haines v. Raven Arms*, 536 Pa. 452, 640 A.2d 367. "The question is whether the award of damages falls within the uncertain limits of fair and unreasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake or corruption." *Haines, supra* at 455, citing *Carminiti v. Philadelphia Trans. Co.*, 405 Pa. 500, 509, 176 A.2d 440, 445 (1962). An order by the trial court reducing the jury's verdict is the equivalent of a certificate that in its opinion, the original verdict cannot be supported. *Corabi v. Curtis Publishing*, 437 Pa. 143, 151, 262 A.2d 665, 668 (1970). A grant of remittitur will not be disturbed absent a clear abuse of discretion or error of law. *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285 A.2d 451 (1971).

When deciding whether the jury's verdict was excessive the following factors are considered: 1) whether the injury is permanent or is subject to healing; 2) the severity of the injury; 3) whether the "injury is demonstrated by physical evidence" or the plaintiff's subjective testimony; 4) whether the plaintiff can continue employment after the injury; 5) "out-of-pocket expenses;" and 6) plaintiff's demand when the complaint was filed. *Kemp v. Phila. Transp.*, 361 A.2d 362, 364-366 (Pa.Super 1976). Here, Plaintiff cannot meet this standard. Although there was disagreement as to the permanence of the injury, the Court had a reasonable basis for

finding that the verdict was excessive. See *Logue v. Potts Mfg. Co.*, 112 A.2d 370, 371 (Pa. 1955) (where plaintiff injured his knee cap in an automobile accident, the court held the jury's verdict excessive[5] even though the experts disagreed as to the permanence of the injury). In this case, Plaintiff's own doctor testified that he was capable of doing sedentary work, (Tr. Dep. of Dr. Gupta at 24), and that the injury was not necessarily permanent. *Id* at p.26. Moreover, Plaintiff is able to perform many of the tasks of day to day living, e.g. walk, write, drive, etc. Thus, Plaintiff's injury is not so severe as to bear a reasonable relationship to the $3,000,000.00 jury verdict.

Turning now to Defendant's appeal, Defendant complains that the Court erred in allowing the jury to view a photograph which was allegedly prejudicial. Specifically, Defendant claims that the photograph of the Railyard was taken from an angle which tended to make the ditches look larger and the ground more uneven then was in fact the case. However mere exaggeration or "prejudice" is not a sufficient basis for setting aside a verdict. "Prejudice does not refer to being detrimental to party's case, but refers to an undue tendency to suggest a decision on an improper basis." *Fernandez v. City of Pittsburgh*, 643 A.2d 1176, 1181 (Pa.Cmwlth. 1994), citing *Morrison v. Department of Public Welfare Office of Mental Health*, 148 Pa. Cmwlth. 245, 610 A.2d 1082 (1992). In this case, Plaintiff had already submitted signifi-

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[5] Plaintiff's medical bills totaled $74, loss wages $219, damage to the automobile $1,100 and pain and suffering $7,029. 112 A.2d at 371. The court held the amount for pain and suffering was excessive and reduced it to $5,029. *Id.*

cant evidence about the condition of the Railyard and the danger it posed to Defendants' employees. Although this picture did not present the Yard in the most positive light, it is clear that the jury had sufficient other bases for reaching its decision and was not improperly swayed by viewing the photograph.

Defendant also claims that the Court erred in refusing to require Plaintiff to produce records related to his fireworks business. This assertion ignores the fact that Defendant did not request the information until trial itself, clearly outside the time limit for discovery set by the Scheduling Order issued on September 28, 1998 which required discovery to be completed on or before March 1, 1999. Moreover the Scheduling Order required Defendant to identify the exhibits that it intended to submit into evidence prior to the pre-trial conference held on June 24, 1999. In failing to comply with either of these deadlines, Defendant waived any claim that it was entitled to Plaintiff's business records. Additionally, Defendant was allowed to question Plaintiff as to the content of the records in question and thus, suffered no prejudice as a result of the Court's decision.

Finally, Defendant complains that the Court erred in giving Plaintiff's requested Point for Charge No. 16 to the jury which was read to the jury as follows:

> In order for Mr. Nast to recover from New Jersey Transit in this case, you must find that his injuries were caused in whole, or in part, by the negligence of New Jersey Transit or its employees. In other words, [if] New Jersey Transit played any part, even in the slightest one, in bringing about Mr.

> Nast's injuries and damages, then New Jersey Transit will be liable for [sic] those injuries and damages.

N.T. 7/14/99 at 100. The Court went on to charge that even if there was evidence of another cause of Plaintiff's injuries, that does not prevent a finding for Plaintiff so long as the jury found that Defendant was negligent and that such negligence played a part in causing Plaintiff's injuries. *Id.*

To support his request for this charge, Plaintiff relied on the case of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957). There, the Supreme Court of the United States held that under FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that the employer negligence played any par, even in the slightest, in producing the injury . . . for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including contributory negligence." *Rogers, supra* at p.448.

Defendant offers no basis for the argument that this charge should not have been given to the jury. In fact, the holding in *Rogers* continues to be good law. See *Bezerra v. National Railroad Passenger Corporation*, 2000 WL 1285443 (Pa.Super. 2000); *Hileman v. The Pittsburgh and Lake Erie Railroad Company*, 546 Pa. 433, 685 A.2d 994 (1996). Thus, the Court did not commit error in giving Plaintiff's requested Point for Charge No. 16 to the jury.

CONCLUSION

For all the foregoing reasons, the decision of the Court to grant Defendant's post-trial motion solely on the issue of remittitur and remit the verdict from $3,000,000.00 to $500,000.00 should not be disturbed.

BY THE COURT:

_____

WOLF, J.

APPENDIX D- MEMORANDUM OPINION DATED, JULY 23, 2001 FROM THE SUPERIOR COURT OF PENNSYLVANIA

In The Superior Court
of Pennsylvania

ROBERT NAST, :

Appellant : No. 3235 Eastern District
Appeal 1999

v. :

NEW JERSEY TRANSIT :
RAIL OPERATIONS, INC. :
(NJT) :

Appeal from the Order Entered September 22, 1999, in the Court of Common Pleas of Philadelphia County Civil Division, No. JUNE TERM, 1998/No. 3111

In the Superior Court
of Pennsylvania

ROBERT NAST :

v. : No. 3449 Eastern District
Appeal 1999

NEW JERSEY TRANSIT :
RAIL OPERATIONS, INC., :

Appellant :

Appeal from the Order dated September 22, 1999, in the Court of Common Pleas of Philadelphia County Civil Division, No. 3111 June Term, 1998

BEFORE: FORD, ELLIOTT, MONTEMURO,* AND BECK, JJ.

MEMORANDUM:

This case involves cross-appeals following a jury verdict award $3 million in damages to Robert Nast (employee), reduced to $500,000 by the trial court in response to New Jersey Transit Rail Operations, Inc.'s (railroad's) post-trial motions. For the reasons that follow, we reverse in part and affirm in part. The factual and procedural history of the case, aptly set forth by the trial court and supported by the record, follows:

> Plaintiff has been employed by New Jersey Transit Rail Operations ('Defendant') since 1983 as a machinist. N.T. 7/12/99 at 63, 67. [Footnote 1] In that capacity, Plaintiff was in charge of inspection, testing, maintenance, and repair of engines, locomotives and buildings at various railyards to which he was assigned. *Id.* On April 7, 1997, while working at the Raritan Rail Yard (hereinafter 'Raritan Yard' or 'Yard') Plaintiff suf-

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* Retired Justice assigned to Superior Court. Justice Montemuro did not participate in the decision of this matter.

fered injuries when he fell exiting a train car. *Id.* at 70.

At the time of incident, the Raritan Yard was being resurfaced, *Id.* at 44, which entailed excavating and elevating the ground level at the Yard and replacing ties and ballast. *Id.* at 44. This work caused a temporary deterioration of the surface conditions in the Yard, creating numerous holes and uneven ground surfaces. These conditions, coupled with already existing poor or inadequate lighting, constituted a dangerous workplace. *Id.* at 46. Plaintiff made constant complaints to his foreman about the conditions of the Yard, *Id.* at 89, as did ten to fifteen other employees. *Id.* at 46, 48. However, Defendant did nothing to address the safety concerns. *Id.* at 49. [Footnote 2]

At trial, Plaintiff testified as follows. On April 7, 199[7], he began work at 3 p.m. and worked though the night shift in order to pick up overtime hours. *Id.* at 70. That night, Plaintiff's duties included inspecting rail cars. *Id.* at 71. In order to get to the trains, Plaintiff had to walk through the Yard which at that time, as part of the resurfacing project, was marked by two-foot trenches. *Id* at 72. After inspecting one of the cars, Plaintiff attempted to exit the train. Keeping both hands on the railing, Plaintiff climbed down a ladder on the side of the car until he felt the ground under one foot. *Id* at 74. As Plaintiff reached with his other foot to place it on the ground, he found a void, leaving him with no place to stand. *Id.* Plaintiff

then slipped off the ladder and fell into one of the two-foot trenches below. *Id* at 74-75. In explaining his fall, Plaintiff testified that, unlike the flashlights that were provided to conductors, which fastened to the arm and allowed the conductor to look down before stepping down to the ground, *Id.* at 81, the hand-held flashlight that had been given was of not help when descending from the train because he had to use both hands to hold on to the ladder. [Footnote 3] *Id.* Thus, Plaintiff argued, if the machinists had been given flashlights similar to those issued to conductors, this accident could have been avoided. *Id.*

After the fall, Plaintiff experienced mild pain which persisted for the remainder of his shift. *Id.* at 85. Although Plaintiff did not report his fall immediately, when the pain worsened, Plaintiff did tell his foreman about the accident the following day. *Id.* Plaintiff was told to see the company physician, Dr. Rowe, who directed him to take two aspirin and go back to the Yard. *Id* at 86. For the next week, Plaintiff continued to work with pain. Finally, Plaintiff complained again the following week. *Id.* at 87. Again, Dr. Rowe examined Plaintiff, found damage to his nerve and foot, and took plaintiff off of service. *Id.*

Thereafter, Plaintiff began a therapy program which failed to alleviate his pain. *Id.* at 92. In fact, during this time, the pain worsened, *Id.* at 93, extending from his lower back , down his right leg, and over to the front of his knee. *Id.* Plaintiff un-

derwent a myelogram which revealed the existence of nerve damage. *Id.* Since that time, Plaintiff has treated with Dr. Giriwarlal Gupta ('Dr. Gupta'), a board certified neurologist who diagnosed Plaintiff as suffering from lumbar radicular pain and damage to the nerve roots coming out of the spine. Trial Deposition of Dr. Giriwarlal Gupta at 9 (hereafter 'Tr. Dep. of Dr. Gupta'). Plaintiff also began to lose some feeling in his right lower limb (i.e., dull on pinprick) (Tr. Dep. of Dr. Gupta at 6), specifically his calf and outer portion of his right foot. Trial Deposition of Dr. Stephen Gollomp at 17. In January of 1998, Plaintiff stated that the pain had begun to radiate from his back down his right leg and up through his toes (Tr. Dep. of Dr. Gupta at 16), which is known as 'right-sided sciatica'. Plaintiff has been attempting to manage the pain with Tegretol. *Id.* at 94. While this medication has taken the edge off his pain, Plaintiff complains that it makes him tired and drowsy, *Id.* at 94, and causes him to suffer from headaches and diarrhea. (Tr. Dep. of Dr. Gupta at 9). Even with the help of the medication, it is likely that the pain will linger for a long time--perhaps permanently. (Tr. Dep. of Dr. Gupta at 25). Moreover, Plaintiff can no longer perform the function of his former occupation as a machinist with New Jersey Transit Rail. (Tr. Dep. of Dr. Gupta at 24).

As of the date of trial, Plaintiff who had been the sole provider to his wife and four children, N.T.

7/12/99 at 100, had been unable to gain employment, N.T. 7/13/99 at 15, and had limited his involvement with his fireworks business to administrative duties. N.T. 7/12/99 at 100. Moreover, due to his injuries, Plaintiff is unable to apply his skills as a mechanic, and therefore, his choices are limited to those unskilled jobs that don't require long periods of sitting, standing or walking, or lifting. *Id.* at 18. However, although Plaintiff is unable to lift a significant amount of weight, *Id.*, and has limited ability to stand, Dr. Gupta stated that he should be able to perform a sedentary job, e.g. office work, where he does not have to do bending twisting or lifting. (Tr. Dep. of Dr. Gupta at 24).

Plaintiff also claims to have trouble doing all the things that he used to do with his children, *Id.* at 95. His youngest daughter Kelly can't cuddle up with her father, can't sleep with him in bed, can't wrestle or play ball with him, and Plaintiff cannot go to any of her sports activities. *Id* at 138. His oldest son, Bobby, took a semester off from college to help the family with bills and to do the heavy work for the fireworks business. *Id.* at 100. Plaintiff has been frustrated by his chronic pain and he has grown depressed. N.T. 7/12/99 at 139.

To determine the value or amount of financial loss that has been and will be suffered Plaintiff presented the testimony of Dr. Andrew Verzilli, a professor of economics at Drexel University. N.T. 7/13/99 at 55. Dr. Verzilli testified that prior to the

accident, Plaintiff's income was just over seventeen (17) dollars per hour. *Id.* at 69. In 1995, he earned $40,900; in 1996, he earned $34,000; and before this incident in April 1997, he had already earned $22,000. *Id.* at 69-70. Thus, assuming an average salary between $30,000 and $40,000 each year until retirement between the ages 65 and 70 years old, Plaintiff will lose at least $369,000 but not more than $723,000 due to his injury. *Id.* at 76. [Footnote 4]

A three (3) day jury trial was held on July 12 through July 14, 1999. After deliberation, the jury returned a verdict finding Defendant negligent and assessing damages against Defendant in the amount of $3,000,000.00. Thereafter, on July 20, 1999, Defendant filed timely post-trial motions, asking the court to either grant new trial, or grant remittitur. On September 22, 1999, this Court denied Defendant's request for a new trial but granted remittitur, reducing the amount of the award to $500,000.00.

[Footnote 1] Plaintiff had also owned and operated a fireworks business on the side for a number of years before the accident. *Id.* at 98. This business not only sold fireworks, but alto put on fireworks displays. *Id.* at 99. Prior to his injury, Plaintiff worked at this business part-time, loading trucks, lifting boxes, handling accounts and putting on the actual displays. *Id.* Since the accident, Plaintiff is limited to designing the programs. *Id.* at 100.

[Footnote 2] In addition to evidence concerning the poor conditions at the Yard, Plaintiff presented testimony regarding Defen-

Trial court opinion, 10/12/00 at 1-6.

Employee raises the following issues on appeal:

> Whether the trial court erred in ordering a remittitur of the jury's verdict because it
>
> [1.] incorrectly imposed the burden on [employee] to justify his verdict and failed to apply the proper standard for evaluating a claim of excessiveness; and
>
> [2.] interfered with the jury's function; and
>
> [3.] committed a gross abuse of discretion in ordering a remittitur to an amount less than 17 per-

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dant's lack of concern for the safety of its employees. *Id.* at 69. For example, Defendant failed to explain proper safety rules to its personnel, *Id.* at 69, failed to discuss proper safety procedures at the [Y]ard to its employees, *Id.* and failed to give notice as to the improvements or resurfacing. *Id.*

[Footnote 3] Thomas Lawson, and electrician employed by Defendant, testified that although he was not working at the Yard on that day of Plaintiff's fall, the lighting in the Yard during the two months immediately prior to the fall was completely inadequate. *Id* at 60. Specifically, the only lighting available at the time were 50-watt lights near each of the rail car's forty-inch wheels. *Id.* at 57. As a result, to provide illumination during nighttime inspections, each machinist was given one hand-held flashlight. *Id.* at 50.

[Footnote 4] These figures represent the net salaries to be earned, taking into consideration the taxes and other deductions to be paid, and

> cent of the original verdict, and below the amount of the [employee's] objective evidence of damages?

Employee's brief at 7.

Railroad, in contrast, asks:

> 1. Did the trial court abuse its discretion or commit an error of law in refusing to require [employee] to produce his 1998 and 1999 business records in conjunction with a Notice to Attend, or to permit [railroad] to introduce these records into evidence?
>
> 2. Did the trial court abuse its discretion or commit an error of law in refusing to allow [railroad] to use ***any*** of [employee's] business records or evidence of income from said business at trial?
>
> 3. Did the trial court commit an error of law or abuse of discretion in permitting [employee] to use a prejudicial and inflammatory photograph at trial?
>
> 4. Did the trial court abuse its discretion or commit an error of law in giving [employee's] requested Point for Charge No. 16, involving the case *Rogers v. Missouri Pacific Railway Company*, 352 U.S. 500 (1997).
>
> 5. Did the trial court err in ordering a remittitur of the jury's verdict?

Railroad's Brief at 4. Because finding in favor of railroad on any of its first four issues would render the issue of remittitur moot, we address railroad's evidentiary and jury instruction claims of error first.

In its first two issues, railroad claims trial court error in refusing to require employee to produce his 1998 and 1999 business records regarding his fireworks business in conjunction with a Notice to Attend, or to permit railroad to introduce these records into evidence. Railroad claims it is entitled to a new trial, or a new trial as to damages, at which employee would be required to produce these records and railroad would be entitled to enter them into evidence. (Railroad's brief at 21). According to railroad, these records went to the issues of future earning capacity and mitigation of damages. (Notes of Testimony, 7/12/99 at 10).

"[A]n appellate court reviews the denial of a motion for a new trial in the same manner as the grant of a new trial. It is settled that the grant or denial of a new trial rests in the discretion of the trial court." *Bezerra v. National Railroad Passenger Corp.*, 760 A.2d 56, 58 (Pa.Super.2000), *appeal denied*, 2001 Pa.Lexis 683 (Pa. April 3, 2001), citing *Kiser v. Schulte*, 538 Pa. 219, 648 A.2d 1 (1994). "[I]n reviewing an order to grant [or deny] a new trial our standard of review is limited to determining whether the trial court abused its discretion or committed an error of law." *Id.* (citations omitted).

Likewise, the admissibility of evidence is within the sound discretion of the trial court, whose rulings will not be disturbed absent an abuse of discretion or error of law. *Ratti v. Wheeling Pittsburgh Steel Corp*, 758 A.2d 695, 707 (Pa.Super 2000), *appeal denied*, 2001 Pa.Lexis 41 (Pa. Janu-

ary 4, 2001). "An abuse of discretion is not merely an error in judgment; rather it occurs when the law is overridden or misapplied, or when judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill-will." *Pilon v. Bally Engineering Structures*, 645 A.2d 282, 285 (Pa.Super. 1994), *appeal denied*, 539 Pa. 680, 652 A.2d 1325 (1994), *rejected on other grounds, Shope v. Eagle,* 551 Pa. 360, 710 A.2d 1104 (1998).

"As a basic proposition, to be admissible, evidence must be both competent and relevant." *Sprague v. Walter*, 656 A.2d 890, 918 (Pa.Super. 1995) (citation omitted), *appeal denied,* 543 Pa. 695, 670 A.2d 142 (1996). "Competent evidence is that which is relevant and material to the issues to be determined at trial." *Id.* (citation omitted). "Evidence is relevant if it logically or reasonably tends to prove or disprove a material fact in issue, tends to make such a fact more or less probable, or affords the basis for or supports a reasonable inference or presumption regarding the existence of a material fact." *Id.* (citation omitted). "Furthermore, the trial court may properly preclude any evidence . . . if the trial judge determined that the evidence may confuse the issues or mislead the jury." *Id* (citation omitted).

In this case, employee did not claim he was entitled to damage for loss of income from his fireworks business, nor was his income from that business relevant to the losses he sustained as a result of his inability to continue his employment as a machinist with railroad. All of the economic damages to which the economics expert and the rehabilitation consultant testified concerned only employee's loss of income and benefits from his railroad employment compared

with income and benefits he was likely to obtain after the accident. (See notes of testimony, 7/13/99 at 9-37, 60-78).

Employee had income from the fireworks business, which he ran from his home, prior to the accident, and he had income from that business after his accident. His only testimony concerning that business was that the accident rendered him physically incapable of doing most of the heavy work that business required, for which he relied on others, while he continued to design the fireworks displays. (Notes of testimony, 7/12/99 at 98-100, 122-123). He did not claim that as a result of his reduced capacity, his income from the fireworks business had suffered, or that his need to rely on others decreased his net profit from that business. As a result, evidence regarding the financial condition of the fireworks business before and after employee's accident was collateral to the issue of appellant's damages resulting from the accident, which precluded his future employment as a machinist.

"Pa.R.E. 402, states that '[e]vidence that is not relevant is not admissible.'" *Monschein v. Phifer*, 771 A.2d 18, 22 (Pa.Super., 2001), quoting trial court, 2/2/00 at 8. In *Monschein,* the trial court found, and this court agreed, that Mr. Monschein did not establish through his economic expert or otherwise how Mrs. Monschein's lost wages were relevant to her husband's economic loss and, as such, were not relevant to the issue before the jury and were properly excluded. *Monschein,* 771 A.2d at 22. Likewise, in this case, the trial court properly excluded evidence of employee's income as a result of his inability to continue his employment as a machinist. See also *Brinich v. Jencka*, 757 A.2d 388, 395-396 (Pa.Super. 2000) (evidence of general contractor's use of his

uncle's credit information and other alleged unspecified acts of past business misconduct were not relevant, even if true, to whether general contractor intended to finish construction of homebuilder's home), *appeal denied*, 2001 Pa.Lexis 646 (Pa .March 30, 2001).

As to railroad's claim that the business records went to mitigation of damages, we are aware of no requirement that a plaintiff in a negligence case mitigate his damages. Rather, mitigation of damages is required in cases involving breach of contract. See *Delliponti v. DeAngelis*, 545 Pa. 434, 443, 681 A.2d 1261, 1265 (1996) (one who suffers a loss due to breach of contract has a duty to make reasonable effort to mitigate her damages). To the extent railroad is claiming the records related to employee's continuing ability to earn income from his fireworks business, which would offset his loss of income as a machinist, we have already address that issue. Employee's seasonal fireworks business was an independent source of income before, during, and after the accident, and had no relationship to the losses he sustained as a result of the accident, the only issue properly before the jury. Additionally, the fact that employee could continue his self-employment because he could rest and move around as needed and could limit himself to sedentary jobs had no bearing on his ability to earn income in the open labor market.

In its third issue, railroad claims trial court error in admitting into evidence an allegedly prejudicial and inflammatory photography. This photograph depicted the trench into which employee fell; however, the photographer took the picture while lying on his back at the bottom of the trench,

thereby creating an illusion that the trench was much deeper than it measured. (Notes of testimony, 7/12/99 at 4-9).

"The trial judge has broad discretion regarding the admission of potentially misleading or confusing evidence." *Sprague*, 656 A.2d at 909, citing *Daset Mining Corp. v. Industrial Fuels Corp.*,473 A.2d 584 (Pa.Super. 1984). "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion." *Id.*, citing *Whistle Sportswear, Inc. v. Rullo*, 433 A.2d 40 (Pa.Super. 1981). "The function of the trial court is to balance the alleged prejudicial effect of the evidence against its probative value, and it is not for an appellate court to usurp that function." *Id.*, quoting *Engle v. West Penn Power Co.*, 598 A.2d 290, 301 (Pa.Super. 1991), *appeal denied*, 529 Pa. 669, 605 A.2d 334 (1992) (citation omitted).

In this case, we find no abuse of discretion. The trial court gave due consideration to the likelihood the picture would prejudice the jury, and prohibited employee's attorney from using it in his opening argument. (Notes of testimony, 7/12/99 at 3-9). The court also required employee's counsel to establish precisely the actual dimensions of the trench. (*Id.*) Finally, the court allowed the photograph to be admitted only subject to cross-examination by railroad's attorney, who would establish that the photograph represented a distorted view of the trench.

A review of the testimony at trial indicates that is exactly what occurred. (*Id.* at 81-84, 114-117). On cross-examination, railroad's attorney asked employee if the photograph represented a distorted view of the trench, taken from the bottom up rather that from employee's perspective

before he fell, and employee acknowledged that it did. Thus, we see no merit to railroad's assertions that the photograph misled the jury into awarding an allegedly excessive verdict.

In its fourth issue, railroad claims the trial court erred by giving employee's requested point for charge based on the case of *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1997). Specifically, railroad takes exception to the following language in the trial court's charge: "In other words, [if] [railroad's] negligence played any part even the slightest one in bringing about [employee's] injuries and damages, then [railroad] will be liable with [sic] those injuries and damages." (Notes of testimony, 7/13/99 at 100). According to railroad, the trial court's charge improperly allowed the jury to infer that any *negligence* on the part of railroad, however, slight, rendered railroad liable to employee.

"In examining an alleged erroneous instruction to the jury, it is necessary to view the charge as a whole." *Bezerra*, 760 A.2d at 65, quoting *Ely v. Reading Co.*, 424 F.2d 758, 760 (3rd Cir. 1970). In this case, however, we need not undertake such a task, as there clearly was no error in the portion of the charge railroad contests. The court stated that law as it has been interpreted under the Federal Employers' Liability Act (FELA) since at least 1957 when Supreme Court authored *Rogers, supra*: the plain meaning of the sentence to which railroad objects is that if railroad's negligence played any part in causing employee's harm, railroad can be found li-

able. The emphasis in that charge is on causation, not negligence as railroad contends.[1]

Having found no merit to railroad's first four issues, we turn to employee's issues and railroad's fifth issue, all of which address the propriety and reasonableness of the trial court's grant of remittitur. As noted *supra*, the trial court reduced the jury's verdict from $3 million to $500,000. Employee claims trial court error in reducing the verdict at all, or in reducing it to such and extent, and also claims error in placing the burden on employee to justify the verdict. (Employee's Brief at 7). Railroad, in contrast, argues the court's reduction was proper. (Railroad's brief at 4).

"Judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant." *Haines v. Raven Arms*, 536 Pa. 452, 455, 640 A.2d 367, 369 (1994), supplemented by *Haines v. Raven Arms*, 539 Pa. 401, 652 A.2d 1280 (1995). "The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption," *Id.* (citation omitted).

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[1] The *Rogers* court held that under FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506. See also *Bezerra*, 760 A.2d at 53 (quoting *Rogers*).

> '[T]he grant or refusal of a new trial [or remittitur] because of the excessiveness of the verdict is peculiarly within the discretion of the trial court and will not be reversed unless an abuse of discretion or an error of law has been committed. Recognizing the difficult task encountered by an appellate court in reviewing the record when a trial court merely assigns conclusory statements'- "interest of justice," "shocks the court's conscience" and "substantial justice"- we have attempted to discourage this practice.'

Id., quoting *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 290, 285 A.2d 451, 456-457 (1971) (other citations omitted). Furthermore, "[I]n reviewing the grant of a remittitur, we accord particular deference to the wide discretion of trial judges, and will not reverse unless a clear abuse of discretion or error of law has occurred." *Id.* at 457, 640 A.2d at 370, citing *Scaife Co., supra* (other citations omitted). Finally, " A remittitur should fix the highest amount any jury could properly award, giving due weight to all of the evidence offered." *Gunn v. Grossman*, 748 A.2d 1235, 1240-1241 (Pa.Super. 2000), *appeal denied*, _____Pa.____, 764 A.2d 1070 (2000), quoting *Cashdollar v. Mercy Hospital of Pittsburgh*, 595 A.2d 70, 76 (Pa.Super. 1991); accord *Bindschusz v. Phillips*, 771 A.2d 803, ___, 2001 WL 290422. At 8 (Pa.Super, March 27, 2001),[2] quoting *Cashdollar*, 595 A.2d at 76.

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[2] Publication page references were not available as of June 13, 2001.

The supreme court in *Haines* noted that this court has developed six factors analyzing the propriety of a remittitur: 1) the severity of the injury; 2) whether the injury is demonstrated by objective physical evidence; 3) whether the injury is permanent; 4) the plaintiff's ability to continue employment; 5) the disparity between the amount of out-of-pocket expenses and the amount of the verdict; and 6) the amount demanded in the original complaint. *Haines, supra* at 457, 640 A.2d at 370, citing *Stoughton v. Kinzey*, 445 A.2d 1240, 1242 (Pa.Super. 1982).

We will first address employee's claim that the trial court improperly place the burden on employee to justify the jury's verdict. In its opinion, the trial court cites the six factors set forth *supra*, and then opines, "Here the plaintiff cannot meet this standard." (Trial court opinion, 10/12/00 at 7). Then, apparently viewing the evidence in the light most favorable to railroad, the trial court observed that even employee's physician indicated he was capable of doing sedentary work; that his injury might not be permanent; and that employee was still able to perform many of the tasks of day-to-day living, such as walking, writing, and driving. (*Id.*) At no point, however, does the trial court indicate that the verdict shocked her conscience or was so excessive as to be exorbitant.

We agree with employee that the trial court appears to have placed the burden on the wrong party. "The trial court may only grant a request for remittitur where a verdict [for the plaintiff] *that is supported by the evidence* suggests that the jury was guided by partiality, prejudice, mistake or corruption." *Sprague*, 656 A.2d at 924 (emphasis added), citing *Krysmalski by Krysmalski v. Tarasovich*, 622 A.2d 298, 312 (Pa.Super. 1993) (*en banc*), *appeal denied*, 535 Pa. 675, 636

A.2d 534 (1993). The party seeking remittitur thus bears the burden of establishing that the [amount of] the verdict resulted from the jury's having been influenced by one of those factors listed in *Sprague, supra. Brinich*, 757 A.2d at 398. Only if the moving party establishes from the evidence presented that the jury based the amount of its verdict on an improper consideration may the trial court determine that the verdict shocks its sense of justice because it does not fall "within the uncertain limits of fair and reasonable compensation." *Sprague*, 656 A.2d at 924, quoting *Haines, supra* at 456, 640 A.2d at 369 (other citations omitted). Furthermore, we, like the trial court, must view the evidence in the light most favorable to employee as verdict winner. *Haines, supra* at 453, 640 A.2d at 368.

As employee correctly observes, evidence presented at trial indicated the accident had reduced employee's earnings capacity alone by as much as $723,000; thus, the trial court's reduction of the jury award to $500,000, assuming remittitur was proper at all, certainly does note "fix the highest amount any jury could properly award, giving due weight to all the evidence offered." *Cashdollar*, 595 A.2d at 76. The question therefore becomes whether remittitur was appropriate in the first instance.

"The law in Pennsylvania is clear that a court may not declare an award excessive simply because the court, sitting in place of the jury, might have awarded a lesser amount." *Haines, supra* at 461, 640 A.2d at 372 (Cappy, J., dissenting). At the same time, "Damages for pain and suffering are compensatory in nature, may not be arbitrary, speculative, or punitive, and must be reasonable." *Haines, supra* at 468, 640 A.2d at 370 (majority opinion). It is "the responsibility

of the judiciary to keep pain and suffering awards within reasonable bounds in a case . . . where the jury cannot help but have sympathy for the plight of the plaintiff." *Id.* at 457, 640, A.2d at 370, quoting trial court opinion in *Haines.*

In order, therefore, to determine the property of remittitur and, if proper, the correct amount of remittitur, we return to the six factors adopted by the *Haines* court, noted *supra.* Regarding the severity of employee's injury, evidence at trial indicated that the employee damaged the nerve root coming out of his spine and running down his right leg into his right foot. Regarding, the second factor, the injury was objectively verified by an EMG, which registered positive shock waves emanating from the nerves, thereby indicating damage or irritation. (Deposition transcript, Giriwarlal Gupta, M.D. (Gupta Transcript), at 7/8/99 at 12-13). The injury caused weakness to the right foot and numbness to the right foot and lower leg, and also caused pain that employee described as "like a toothache," thereby preventing him from standing, sitting, or walking for more than short periods of time. The injury has also resulted in employee's inability to sleep through the night because of pain. (Notes of testimony, 7/12/99 at 94-95). As a result of the injury, employee, who worked as a machinist, will never be able to return to his chosen occupation or to perform any but the most sedentary jobs. (Gupta transcript at 24).

Even with those jobs, however, employee will be required to find an employer who will allow him to take frequent breaks, including stretching out on a cot or bed from time to time during the day. (Notes of testimony, 7/13/99 at 27). Rosaline Sampson, the rehabilitation consultant who extensively tested employee, testified that he had no transferable

skills because of his injuries. (*Id.* at 18) Sampson also testified that employee did not use his hands well with the manipulation skills, thus eliminating most sedentary jobs that require use of a computer. (*Id.* at 16) Sampson also found employee unqualified for supervisory or management level positions, which he had never had. (*Id.* at 13) Thus, Sampson determined that employee would most likely be eligible for only sedentary jobs that required using gross motor movements, such as handling parts at least an inch or so in size; that he would be unable to work a full eight-hour day; and that the jobs for which he might be eligible would not provide benefits such as health insurance. (*Id.* at 19-20). Furthermore, because employee lives in a rural area with few jobs of any kind , any job he did find would probably pay the minimum wage (*Id.* at 21).

In addition to his inability to continue his employment, employee testified he was unable to do most of the things he used to do with his children, such as playing sports and attend their activities. (Notes of testimony, 7/12/99 at 96). Employee testified that his wife now performs all of the chores around the house, such as gardening, ladder work, mowing the lawn, etc., unless the children are available to help. (*Id* at 96-97). Employee must now also purchase the six to seven cords of wood he used to split every winter to heat his house. (*Id.* at 97). The evidence therefore indicates that a man who relied on his physical strength to support his family and to care for his home must now sit by and watch others perform the work he enjoyed.

As to the permanency of employee's injuries, while no one was able to say conclusively that the nerve root damage and resulting pain will be permanent, the consensus among

the experts was that an injury that has lasted two years will probably be permanent. (Gupta transcript at 21-22, 25; deposition transcript, Stephen M. Gollomp, M.D. (Gollomp transcript), 7/8/99 at 29). The experts also agreed that surgical intervention would not help employee because the cause of the pain was nerve root damage, not a herniated disc. The only treatment for the pain, therefore, is medication such as Tegretol. (Gupta transcript at 25; Gollomp transcript at 28-29). Although this medication "takes the edge off" employees pain, it also causes drowsiness and diarrhea. (Gupta transcript at 19; notes of testimony, 7/12/99 at 94).

We have attempted to compare employee's losses with losses sustained by other plaintiffs in cases in which remittitur was an issue, and conclude that such a comparison is difficult if not impossible, much like comparing apples with oranges.[3] For example, in *Haines, supra*, the 14-year-old plaintiff suffering catastrophic injuries to her brain, which caused permanent physical impairment and which, in addition, deprived her of the ability to have normal relationships with other human beings and left her vulnerable to anyone who might try to take advantage of her. *Haines, supra* at 457, 640 A.2d at 369. While Haines was not in physical pain, she suffered the emotional pain of remembering that she was once normal, and did not understand why she could no longer be treated as such. *Id.* The *Haines* court, in a 4-3 decision, affirmed the trial court's remittitur of the jury's $8

[3] We are also aware that juries are not aware of the awards granted for pain and suffering in other cases when they fashion their awards.

million verdict for pain and suffering to $5 million. *Id.* at 458-458, 640 A.2d at 370.

In this case, the jury awarded employee the lump sum of $3 million, which the trial court reduced to $500,000. We have already concluded that $500,000 was insufficient to compensate employee even for the highest estimated lost earning capacity the jury could have awarded; therefore, such a reduced award does not compensate employee at all for pain and suffering. Our review of the evidence, set forth *supra,* clearly indicates, however, that employee will in all likehood suffer both physical and psychological pain for the rest of his life.[4]

While we do not pretend to possess the wisdom of Solomon and recognize that we are reviewing a cold record, we nevertheless find no basis upon which to disturb the jury's verdict or to grant a remittitur or a new trial as to damages. "[S]ince pain and suffering have no market value, the amount to be awarded therefor is left to the common sense and sound judgment of the injury." *Martin v. Soblotney*, 442 A.2d 700, 707 (Pa.Super. 1982), *reversed in part on other grounds,* 502 Pa. 418, 466 A.2d 1022 (1983). As Justice Eagen so aptly stated in *Corabi v. Curtis Publishing Co.*, 437 Pa. 143, 262 A.2d 665 (1970), the plaintiff, who is, after all, the verdict winner, does in fact *suffer* a new trial, with its accompanying expenses; monetary, temporal, and psychological. *Id.* at 151, 262 A.2d at 668.

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[4] Employee was 49 years old ate the time of trial. (Notes of testimony, 7/13/99 at 75).

Because we cannot state with certainty that the jury's award of $3 million falls outside the uncertain limits of fair and reasonable compensation so as to be exorbitant, *Haines, supra* at 455, 640 A.2d at 369, we find no basis upon which to disturb that award. If we subtract from the award $723,000 for lost earning capacity, we are left with $2,277,000 for pain and suffering. We do not find this award so out of line with awards in similar cases as to shock the conscience. See *Botek v. Mine Safety Appliance Corp.*, 531 Pa. 160, 166, 611 A.2d 1174, 1176-1177 (1992) (finding that this court erred in granting a drastic remittitur from the jury's verdict of $350,000 to $783.05, which the trial court upheld; concluding that this court improperly discounted employee's emotional and psychological injuries even though he suffered no permanent physical injuries); *Sprague*, 656 A.2d at 924 (upholding the jury's compensatory damage award of $2.5 million where *Sprague*, a public official, suffered defamation that blotted his reputation for professional competence and person integrity and ended his career in public service); *Tessauro v. Perridge*, 650 A.2d 1079, 1081 (Pa.Super. 1994) (upholding the trial court's decision not to grant remittitur or a new trial where the jury returned a verdict of $2,747,000 to injured patient and $593,000 to her husband based on evidence that as a result of dentist's negligence, patient suffered severe damage to her trigemenial nerve, causing numbness, burning, and sharp pain on the left side of her face, as well as extreme difficulty opening her mouth to talk or eat; where even after radical experimental surgery that corrected the most oppressive symptoms, patient continued to suffer numbness and burning); *appeal denied*, 541 Pa. 627, 661 A.2d 874 (1995); *Harding v. Consolidated Rail Corp.*, 620 A.2d at 1185, 1193 (Pa.Super. 1993) (up-

holding the trial court's refusal to grant remittitur or a new trial where the jury returned a verdict of $3.8 million to a employee in a FELA case where the accident resulted in a total amputation of employee's left foot and partial amputation of his right foot, thereby rendering him incapable of continuing his former employment).

We therefore vacate the trial court's order granting remittitur and reinstate the jury's verdict of $3 million. We affirm, however, as to railroad's first four issues on cross-appeal.

Affirmed in part and reversed in part. Jury's verdict of $3 million is reinstated. Jurisdiction is relinquished.

Judgment Entered.

Prothonotary

Date: July 23, 2001

APPENDIX E – ORDER DATED SEPTEMBER 27, 2001 FROM THE SUPERIOR COURT OF PENNSYLVANIA

		In The Superior Court of Pennsylvania
Robert Nast,	:	
Appellant	:	
v.	:	No. 3235 EDA 1999
New Jersey Transit Rail Operations, Inc. (NJT)	:	
Appellee	:	
Robert Nast,	:	
Appellee	:	
v.	:	
New Jersey Transit Rail Operations, Inc.	:	
Appellant	:	No. 3449 EDA 1999

ORDER

AND NOW, this 27th day of September, 2001, IT IS HEREBY ORDERED:

THAT the application filed August 6, 2001, requesting reargument/reconsideration of the decision dated July 23, 2001 is DENIED.

PER CURIAM

APPENDIX F- ORDER DATED FEBRUARY 12, 2002 FROM THE SUPREME COURT OF PENNSYLVANIA

No. 540 & 541 EAL 2001

Robert Nast,

Petition for Allowance of Appeal from the Order of the Superior Court

Respondent

v.

New Jersey Transit Rail Operations, Inc. (NJT)

Petitioner

ORDER

PER CURIAM:

AND NOW, this 12th day of February 2002, the Petition for Allowance of Appeal is hereby **DENIED.**

Supreme Court, U.S.
FILED
JUN 14 2002
OFFICE OF THE CLERK

No. 01-1670

IN THE
Supreme Court of the United States

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Petitioner.

v.

ROBERT NAST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this Federal Employers' Liability Act ("FELA") case brought by an injured railroad worker and tried in a Pennsylvania state trial court, did the Pennsylvania Superior Court Panel correctly uphold the Trial Court's discretionary ruling excluding from evidence, on state law evidentiary grounds of irrelevance, tax returns from a separately incorporated Subchapter S corporation owned by plaintiff, which Petitioner offered as relevant to the issue of mitigation of damages, where:

(i) plaintiff did not claim that his income from his fireworks business had declined as a result of his personal injuries,

(ii) the Trial Court admitted other expert testimony and evidence on the issue of plaintiff's mitigation of damages,

(iii) the Trial Court permitted cross-examination of plaintiff on his income from and activity with respect to his independent fireworks business,

(iv) the Trial Court conditioned its ruling on the plaintiff's not offering any testimony that there was "a loss of business income in the second business,"

(v) the Trial Court specifically charged the jury, without objection by Petitioner, "that an injured party is under a legal obligation to mitigate damages, that is to minimize economic loss resulting in his injury by resuming gainful employment as soon as that can be reasonably done," and

(vi) the Trial Court thus specifically placed before the jury the issue of an FELA plaintiff's duty to mitigate, consistent with the uncontradicted, uniform holdings of at least six federal circuits with respect to that issue?

2. Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of an intermediate state appellate court in a Federal Employers' Liability Act suit where the judgment is predicated on the independent and adequate state law evidentiary ground of the lack of relevance of certain proffered evidence that was excluded at trial and where the Petition seeks to induce review based only on a casual remark of the appellate court with respect to a possible alternative ground for that ruling?

3. Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of an intermediate state appellate court where the question presented to this Court by Petitioner was never raised or decided by the state courts below?

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COUNTER-STATEMENT OF THE CASE

On April 7, 1997, Respondent Robert Nast ("Nast"), a machinist employed by Petitioner New Jersey Transit Rail Operations ("Petitioner"), sustained injuries when he fell in exiting a train while working in Petitioner's Raritan Rail Yard. As a result of his injuries, Mr. Nast was unable thereafter to perform his duties as a machinist for Petitioner. 21a.[1]

At the time of trial, two years later in July 1999, Mr. Nast was no longer employed by Petitioner and had been unable to secure employment. 22a. At that time, his employment choices were limited to unskilled jobs that did not require extended periods of sitting, standing, walking or lifting. *Id.* Dr. Gupta, Mr. Nast's treating physician, testified at trial that Mr. Nast would only be able to perform sedentary office work in which he could avoid bending, twisting and lifting. *Id.*

Prior to the accident, through a Subchapter S corporation in which he was sole shareholder, Mr. Nast had also conducted a seasonal fireworks business, which both sold fireworks and organized fireworks displays. 23a. Prior to the accident, Mr. Nast worked part-time in the business, loading trucks, lifting boxes, handling accounts and putting on actual displays. *Id.* After the accident, his activities in that business were substantially reduced and were limited to designing fireworks programs. *Id.*

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1. References herein to Petitioner's Brief in Support of Petition for Writ of Certiorari are denoted as "Pet.__" and references to Petitioner's Appendix are denoted as "_a." References to the Reproduced Record in the Superior Court of Pennsylvania are denoted as "R.R." followed by the page of the Reproduced Record.

A. Proceedings in the Court of Common Pleas of Philadelphia County.

Mr. Nast filed suit against Petitioner under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* ("FELA") in the Court of Common Pleas of Philadelphia County, Pennsylvania on June 25, 1998.

1. The Case Management Order – Discovery Cut-Off.

The Trial Court entered a Scheduling Order, dated September 28, 1998, which required that all discovery be completed on or before March 1, 1999. 14a. The Scheduling Order also required Petitioner to identify exhibits that it intended to submit into evidence prior to the pre-trial conference on June 24, 1999. *Id.*

2. The Trial Court's Ruling on Production of the Subchapter S Corporation Tax Returns and Ruling on Inadmissibility of the Tax Returns.

After the March 1, 1999 discovery cut-off, and only a few days before the start of the trial on July 12, 1999, Petitioner sought, by way of a Notice to Attend, additional records relating to Mr. Nast's fireworks business, specifically its 1998 Subchapter S tax returns and business records for 1999 (the "Tax Returns"). 26a. Mr. Nast objected to the request, and the Trial Court, on July 9, 1999, ruled that Mr. Nast was not required to produce the records. On the next business day, July 12, 1999, the Trial Court's decision denying production of the Tax Returns was placed on the record. The Trial Court memorialized its ruling excluding the Tax Returns and carefully premised its ruling on the condition "that there is no testimony introduced by plaintiff that there's a loss of business income in the second business; that the claim is the [sic] testimony reflect only plaintiff's perception of his ability to work and you've already said it's been stipulated . . . acknowledged that he can do sedentary work." (R.R. at 23a-24a).

In subsequently denying Petitioner's post-trial motion, and in response to Petitioner's contention that the documents should have been produced, the Trial Court amplified the reasons supporting its rulings on the production and admissibility of the Tax Returns by pointing to Petitioner's Scheduling Order violation:

> This assertion [regarding non-production and exclusion of the Tax Returns] ignores the fact that Defendant [Petitioner] did not request the information until trial itself, clearly outside the time limit for discovery set by the Scheduling Order issued on September 28, 1998 which required discovery to be completed on or before March 1, 1999. Moreover, the Scheduling Order required Defendant [Petitioner] to identify the exhibits that it intended to submit into evidence prior to the pre-trial conference held on June 24, 1999. 14a.

The Trial Court additionally observed that Petitioner had been permitted to cross-examine on Mr. Nast's fireworks business and held, alternatively, that any error in the evidentiary ruling excluding the Tax Returns was, in any event, harmless: "Additionally, Defendant [Petitioner] was allowed to question Plaintiff as to the content of the record in question and *thus, suffered no prejudice as a result of the Court's decision.*" 14a (emphasis added).

3. The Expert Economics and Vocational Testimony.

Both parties produced vocational and economics experts. The vocational experts, Rosaline Sampson for Mr. Nast and Philip Spergel, M.D. for Petitioner, testified that Mr. Nast was capable of some kind of future employment. However, both acknowledged that he could not return to employment with Petitioner. Using this information, the parties' expert economists, Andrew Verzilli, Ph.D., for Mr. Nast, and Brian Sullivan, Ph.D., for Petitioner, rendered opinions on Mr. Nast's future economic losses.

Although their calculations of Mr. Nast's actual losses differed, both sides' experts assumed that Mr. Nast's future losses would be mitigated by his securing some form of future employment consistent with his physical condition. The Trial Court did not prohibit these experts from testifying with respect to the relationship, if any, between Mr. Nast's attempts to secure future employment and his fireworks business. In addition, Mr. Nast's personal tax returns for 1998, which reflected Mr. Nast's income from the fireworks business, were produced. Petitioner was not prohibited from cross-examining Mr. Nast with respect to the fireworks business (R.R. at 136a).

4. The Trial Court's Jury Charge on Mitigation of Damages.

Contrary to Petitioner's suggestion that mitigation was not an issue in the case, the Trial Court specifically charged the jury on Mr. Nast's duty to mitigate in this FELA case: "*I also instruct you that an injured party is under a legal obligation to mitigate damages that is to minimize economic loss resulting in his injury by resuming gainful employment as soon as that can be reasonably done.*" (R.R. at 513a (emphasis added)). The jury returned a $3 million verdict in Mr. Nast's favor.

5. The Ruling on the Motions for Post-Trial Relief.

Petitioner filed post-trial motions arguing, among other things, that the "Trial Court committed an error of law or abuse of discretion in not requiring plaintiff to produce the 1998 business records of his solely owned business, Interstate Fireworks, Inc., per defendant's Notice to Attend" and in "*refusing to allow the use of any of plaintiff's business records or income from said business during the trial*" and seeking remittitur (emphasis added).

The Trial Court granted remittitur, reducing the jury verdict to $500,000, but denied all other post-trial relief.

B. Proceedings in the Pennsylvania Superior Court.

On Respondent's appeal of the remittitur and Petitioner's cross-appeal, a Panel of the Pennsylvania Superior Court, Pennsylvania's intermediate appellate court, affirmed the Trial Court's evidentiary ruling excluding the Tax Returns, but reversed the Trial Court's remittitur, and reinstated the jury's verdict. The Pennsylvania Superior Court Panel reviewed the evidence concerning Mr. Nast's ability to secure future employment. 36a-37a. In summarizing the vocational testimony, the Panel noted the record evidence that any job that Mr. Nast would find near his hometown would probably pay only the minimum wage and at no time questioned the Trial Court's ruling in permitting the jury to consider these alternative jobs or in permitting the jury to consider Mr. Nast's attempts to mitigate.

The Superior Court Panel acknowledged, but rejected, Petitioner's contention that the Tax Returns were relevant to Mr. Nast's future earning capacity and mitigation of damages. 26a. After noting that the Trial Court's rulings on the admissibility of evidence are not to be disturbed absent trial court abuse of discretion or error of law, the Panel stated that (i) the income from Mr. Nast's seasonal side business was not "relevant to the losses he sustained as a result of his inability to continue his employment as a machinist with railroad (27a)," and (ii) the evidence relating to that seasonal side business was "collateral to the issue of . . . [Nast's] damages resulting from the accident." 28a. The Superior Court Panel held that Mr. Nast's side business was "an independent source of income before, during and after the accident, and had no relationship to the losses he sustained as a result of the accident." 29a.

In its opinion, the Panel incidentally commented that "mitigation" is normally required only in cases involving a breach of contract and found no requirement of mitigation "in a negligence case." The Panel's remark included no specific mention of the FELA. Whether the Panel may have relied on its interpretation of state negligence law as a

surrogate reading of the FELA is unclear and ambiguous at best, and whether the appellate Panel may further have relied on that understanding as an alternative basis of its holding concerning the irrelevance of the Interstate Fireworks Tax Returns, as Petitioner suggests, is conjectural.

Petitioner's application for Superior Court *en banc* reargument was denied.

C. The Evidentiary Question Presented in the Petition for Allowance of Appeal in the Supreme Court of Pennsylvania.

In its Petition for Allowance of Appeal filed thereafter in the Supreme Court of Pennsylvania, Petitioner framed the question for review as one involving *the admissibility of evidence*, i.e., the Tax Returns. "In a case brought under the Federal Employers' Liability Act where plaintiff is alleging a diminution in earning capacity, should defendant be permitted to introduce evidence concerning plaintiff's alternate sources of income?" (Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, at 5).

The Supreme Court of Pennsylvania denied discretionary review with respect to this question of admissibility of evidence.

SUMMARY OF ARGUMENT

This case, involving a state trial court evidentiary ruling on the admissibility of a particular item of evidence in an FELA action, does not warrant plenary review by this Court.

1. This Court lacks jurisdiction to review the judgment below. Both the state Trial Court and the Pennsylvania intermediate appellate court decided the case on the independent and adequate state law ground that certain tax returns Petitioner proffered were irrelevant and collateral to the issues, and therefore inadmissible under state evidentiary rules.

2. The question on the basis of which Petitioner seeks to induce review by this Court, whether a plaintiff in an FELA case has an obligation to mitigate his damages, was neither properly raised and preserved nor decided by the state courts below. In fact, an FELA plaintiff's duty to mitigate was endorsed and presented to the jury in this case by the Trial Court, which admitted other evidence on this issue and specifically charged the jury on that duty. The gist of the Trial Court's and Superior Court Panel's decision in this case involved not whether mitigation was required but what constitutes "mitigation," what is cognizable evidence of mitigation in the context of specific, limited damage contentions by the Plaintiff, and whether, in that context, the specific Tax Returns for Respondent's ancillary business were relevant and admissible in this case.

3. Since the issue of the existence *vel non* of a duty to mitigate is not properly before the Court, there is no "conflict" between the judgment below and the uniform decisions on that point by the federal circuit courts that warrants review.

4. The "conflict," if there were one — a conflict between an isolated panel decision of a single intermediate state appellate court and several unanimous federal circuit courts — is not sufficiently extensive or developed to warrant review by this Court. Petitioner points to not one other conflicting state court decision, and the cited federal circuit court decisions are in complete harmony.

5. The question of relevance and admissibility of tax returns of an ancillary business conducted by an FELA plaintiff is not sufficiently important to justify this Court's plenary review.

6. The judgment below is correct.

ARGUMENT

PETITIONER PRESENTS NO ISSUES THAT ARE WORTHY OF CONSIDERATION UPON A WRIT OF CERTIORARI

A. This Court Does Not Have Jurisdiction to Hear This Case Since It Was Decided on Independent and Adequate State Law Grounds.

This Court does not review a judgment of a state court when there exists an independent and adequate state law ground to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). Where the state law ground is "independent of the federal question and adequate to support the judgment," *Coleman*, 501 U.S. at 729, any opinion of this Court on the federal question would be purely advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). In this case, a state law ground existed for excluding the Tax Returns from the fireworks business (1) independent of the federal question, and (2) adequate to support the judgment.

1. The State Court Judgment Was Based on State Law Evidentiary and Procedural Grounds Independent of Any Federal Question.

The Trial Court in this FELA case specifically charged the jury that it was Mr. Nast's duty to mitigate damages. The issue presented to the state courts was whether the Tax Returns were admissible in evidence as relevant to the extent of this duty in such cases. Petitioner does not appear to dispute that the admissibility of evidence in an FELA case is governed by the law of the forum. *See Harding v. Consolidated Rail Corporation*, 620 A.2d 1185, 1188 (Pa. Super. 1993); 16 Am. Jur. 2d Conflict of Laws §168 (1998); Restatement (Second) of Conflict of Laws §138 (1971). In this case, the applicable law to determine admissibility of evidence was that of Pennsylvania.

The state trial court, which charged the jury on Mr. Nast's duty to mitigate, initially concluded that Mr. Nast was not required to produce the Tax Returns as a result of Petitioner's failure to comply with discovery and pre-trial deadlines in seeking them, and ruled that the Tax Returns were irrelevant. The Trial Court nonetheless ruled that Petitioner would be permitted at trial to question Mr. Nast on the information contained in those records. 14a. When presented with the same question, the Pennsylvania Superior Court Panel affirmed the Trial Court's exclusion of the Tax Returns and remarked that "evidence regarding the financial condition of the fireworks business was collateral to the issue of appellant's damages resulting from accident, which precluded his future employment as a machinist." 28a. In affirming, the Superior Court Panel did not need to decide whether a plaintiff in an FELA action has a duty to mitigate damages, or under what circumstances such a duty arises, or who has the burden of proof on the issue. After thoroughly discussing the other reasons why the Tax Returns were irrelevant and inadmissible in this case, the Panel, in response to Petitioner's argument that the Tax Returns went to mitigation of damages, incidentally remarked it was "aware of no requirement that a plaintiff in a negligence case mitigate his damages." 29a. The Panel, however, went on to emphasize that even if there were a requirement, the Tax Returns were still properly excluded on relevance grounds:

> To the extent railroad [Petitioner] is claiming the records related to employee's [Nast's] continuing ability to earn income from his fireworks business, which would offset his loss of income as a machinist, we have already address [sic] that issue. Employee's [Nast's] seasonal fireworks business was an independent source of income before, during, and after the accident, and had no relationship to the losses he sustained as a result of the accident, the only issue properly before the jury. Additionally, the fact employee [Nast] could continue his self-employment

because he could rest and move around as needed and could limit himself to sedentary jobs had no bearing on his ability to earn income in the open labor market. 29a.

2. The State Law Grounds Were Adequate.

The state law grounds were also adequate. In this case, the judgment rests on three distinct and adequate grounds: 1) the Tax Returns were irrelevant to any of the issues properly before the jury; 2) Petitioner failed to comply with discovery and pre-trial orders; and 3) Petitioner was permitted to question Mr. Nast on the Tax Returns and therefore suffered no prejudice by its failure to have them produced or introduced into evidence. 14a, 26a-29a. The Trial Court determination that the Tax Returns were irrelevant and thus inadmissible was within its discretion and, under Pennsylvania law, may not be disturbed absent a finding of abuse.

Since the state court exclusion of the Tax Returns rested on independent and adequate state law grounds, this Court lacks jurisdiction, and the Petition should be denied.

B. This Court Has No Jurisdiction Since Petitioner Failed to Raise a Substantial Federal Question in the State Court Proceedings and the State Courts Failed to Address a Substantial Federal Question.

The Petition raises no substantial federal question. *See McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940). 28 U.S.C. §1257 requires that the federal statute at issue must have been "drawn in question." 28 U.S.C. §1257(a).[2] The "drawn in question" requirement is met when the statute is "drawn in question in a manner directly

2. The "drawn in question" requirement was applied to petitions for certiorari in the most recent revision of 28 U.S.C. § 1257. Prior to the revision, the requirement was that a question presented for review be "specifically set up or claimed." These phrases have been interpreted as substantially identical.

bearing on the merits of the action." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975); *see also Moore v. Illinois*, 408 U.S. 786, 799 (1972) (declining to review due process claim not argued in state court). Among the purposes of this requirement are to ensure an adequate record for review in this Court, to define the relationship between this Court and the state courts and to provide the state court an opportunity to base its decision on independent and adequate state law grounds. *See Illinois v. Gates*, 462 U.S. 213, 217-224 (1983).

The FELA was never "drawn in question" either by Petitioner or by the state court determinations below. Neither the Trial Court nor the Superior Court Panel were ever squarely presented with the question presented by the Petition to this Court whether a plaintiff under FELA has a duty to mitigate damages. The trial proceeded below on the proposition that there existed such a duty. The Trial Court allowed some questioning of Mr. Nast concerning his ancillary business and specifically charged the jury that Mr. Nast had a duty to mitigate. Both parties' experts testified on Mr. Nast's future employability. The questions presented to the state Trial Court and intermediate appellate court instead concerned whether court-imposed deadlines and state evidence rules precluded the production and admissibility of tax returns related to Mr. Nast's side business.

Petitioner is mistaken in its assertion that the Superior Court Panel squarely addressed the issue whether a plaintiff in an FELA action has a duty to mitigate. 29a. The only possible mention of that issue occurs in an isolated remark by the Panel in its discussion of the Trial Court's evidentiary ruling. There, the Panel merely commented that it was "aware of no requirement that a plaintiff in a negligence case mitigate his damages." 29a. To the extent this reference constituted a holding at all, it is clearly an alternative holding, at best. In this case, evidence was admitted and testimony heard on the mitigation issue, and

the jury was charged on the mitigation issue. Consistent with that background and understanding, when it unsuccessfully sought review in the Supreme Court of Pennsylvania, Petitioner itself framed the question for review as a question of admissibility of evidence: "In a case brought under the Federal Employers' Liability Act where plaintiff is alleging a diminution in earning capacity, *should defendant be permitted to introduce evidence concerning plaintiff's alternate sources of income?*" (Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, at 5 (emphasis added)).

The question presented to the Supreme Court of Pennsylvania is not the issue presented in the Petition in this Court, but rather a question involving merely the *application* of the duty to mitigate to specific damage contentions and related evidentiary issues.

Since the specific question raised in the Petition in this Court was never presented for decision to any of the state courts and was not specifically addressed by the Pennsylvania Superior Court Panel, it was never "drawn in question."

C. The Question Presented Was Waived by Petitioner's Failure to Raise It in the Pennsylvania Supreme Court.

The question Petitioner presented in the Supreme Court of Pennsylvania in its unsuccessful Petition for Allowance of Appeal was solely an issue of admissibility of evidence: "In a case brought under the Federal Employers' Liability Act where plaintiff is alleging a diminution in earning capacity, should defendant be permitted to introduce evidence concerning plaintiff's alternate sources of income?" (Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania at 5). The markedly different Question Presented in the Petition is: "Does a plaintiff in a Federal Employers' Liability Act (45 U.S.C. §51 *et seq.*) case have an obligation to mitigate his damages?"

Not only is the latter question not involved in this case, Petitioner failed to adequately preserve it and thereby waived it.[3]

D. The Judgment Below Is Correct.

This case proceeded in the state courts on the understanding that Mr. Nast had a duty to mitigate his damages under the FELA. Both Mr. Nast's and Petitioner's experts testified concerning Mr. Nast's ability to mitigate his damages by obtaining other employment. The jury was specifically charged on Mr. Nast's duty to mitigate. Petitioner does not challenge the adequacy of the jury charge.

Instead, Petitioner challenged the Trial Court's decision to exclude the use of the Tax Returns of Mr. Nast's fireworks business. Applying state law rules of evidence and citing *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 707 (Pa. Super. 2000) *appeal denied*, 785 A.2d 90 (2001), the Superior Court reviewed the Trial Court's decision on the admissibility of evidence for abuse of discretion or error of law and found none warranting reversal. 26a. The court noted that in order to be admissible, evidence must be competent and relevant. *See Sprague v. Walter*, 656 A.2d 890, 918 (Pa. Super. 1995), *appeal denied*, 670 A.2d 142 (1996). The Panel held that the information was irrelevant and that "evidence regarding the financial condition of the fireworks business was collateral to the issue of appellant's damages resulting from the accident, which precluded his future employment as a machinist." 28a. The Superior Court Panel also noted that Mr. Nast's fireworks business was "an independent source of income

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3. Moreover, with respect to the issue of admissibility of "evidence concerning plaintiff's alternate sources of income," framed in the Petition for Allowance of Appeal in the Pennsylvania Supreme Court, (i) Petitioner does not even attempt to contend there is any "conflict" warranting review, and (ii) the issue involves only a routine application of the settled principle that mitigation is required.

before, during, and after the accident and had no relationship to the losses he sustained as a result of the accident, the only issue properly before the jury." 29a.

It is also not disputed that Petitioner did not submit any evidence to indicate that as a result of the accident, Mr. Nast could spend more time on the fireworks business and that this increased time had resulted, or would likely result, in increased income to him, or even increased revenue and profits for the side business. To the contrary, Mr. Nast testified, without contradiction, that he no longer could perform many of the functions for the business that he performed pre-accident and was limited now to designing fireworks displays. Despite these undisputed limitations, Mr. Nast did not claim that his fireworks business was damaged as a result of his accident. Upon concluding that the Tax Returns were irrelevant, the state court correctly ruled that the Tax Records were inadmissible. *See* Pa. R.E. 402; *see also Monschein v. Phifer*, 771 A.2d 18, 22 (Pa. Super. 2001).

In this case, the Superior Court Panel correctly affirmed the ruling that the Tax Returns were inadmissible since they were irrelevant to the issues properly before the jury. 29a. The decision to exclude the Tax Returns was not an abuse of discretion, was fully consistent with state law authority, did not involve the Question Presented and does not warrant review by this Court.

Petitioner does not appear to squarely challenge this conclusion in this Court but seeks instead to induce review on a different issue that was never in serious dispute below. The gist of the Trial Court's and Superior Court Panel's decision in this case involved not whether mitigation was required, but what constitutes "mitigation," what is cognizable evidence of mitigation and, in view of plaintiff's particular damage contentions, which were limited, whether the specific Tax Returns involved in this case were relevant and admissible.

E. There Is No Conflict Warranting Review by This Court.

Petitioner's principal contention is that review is warranted because this case involves a "conflict" between a decision by the Supreme Court of Pennsylvania and the federal circuit courts. Pet. at 9. As noted, the Pennsylvania Supreme Court declined to hear the case.[4] What is presented to this Court, at best, is simply an alleged "conflict" between an isolated decision of one state intermediate appellate court panel and the federal circuit courts. Petitioner points to no other conflicting state court decision on this issue, and, as Petitioner correctly asserts, every other federal circuit court to have addressed the issue has reached the same conclusion.

Four of the federal circuit court decisions Petitioner cites relate to the adequacy of jury charges on the duty to mitigate (*Fashauer, Jones, Russell* and *Schneider*). One (*Wilson*) relates to refusal to charge where there was no record evidence that appropriate jobs were available to the plaintiff, and one (*Bissett*) involves a failure to object to the form of the charge. None of them is even related to, much less in conflict with, the decision below in this case.

In *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3d Cir. 1995), the Third Circuit addressed plaintiff Fashauer's contention that the jury charge was flawed since the jury was not instructed that New Jersey Transit had the burden of proving that Fashauer failed to mitigate his damages. The district court instructed the jury that "[p]laintiff must try to minimize the damages due to loss of wages. But extraordinary or

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4. The jurisdiction of the Pennsylvania Supreme Court in this case is discretionary and is exercised only for "special and important reasons." Pa. R. App. P. 1114. As in the case of denials of petitions for writ of certiorari by this Court, the Pennsylvania Supreme Court's decision not to allow an appeal in this case cannot be equated with its adoption of the Pennsylvania Superior Court Panel's reasoning, decision or judgment as Petitioner incorrectly suggests. Pet. 9-10.

impractical efforts are not necessary. All that is required are reasonable efforts and ordinary care in trying to reduce the loss." *Id.* at 1288. In reviewing the adequacy of the charge, the Third Circuit noted that the district court did not explicitly tell the jury that Fashauer had a duty to mitigate and did tell the jury how to reduce damages if it concluded that he failed to mitigate. Nevertheless, the Third Circuit rejected Fashauer's argument that he was prejudiced by the jury charge, concluding, among other things, that defendant has the burden to prove failure to mitigate with regard to past loss of earnings, not future losses. In this case, neither Mr. Nast nor Petitioner challenges the jury charge on mitigation. Petitioner questions only the exclusion of certain evidence that it believed relevant to Mr. Nast's duty to mitigate. That issue was not addressed by the *Fashauer* court.

The *Fashauer* court relied upon the Sixth Circuit's decision in *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593 (6th Cir. 1986), for the general and undisputed statement that under FELA a plaintiff has a duty to mitigate his damages. The Sixth Circuit in *Jones* addressed the adequacy of the jury charge on mitigation, holding that "the charge [on loss of past earnings] did not adequately inform the jury that the plaintiff was entitled to the difference between what he would have earned on the railroad and what he might have earned in another position." *Id.* at 594. *Jones* is inapposite here, where Petitioner does not even challenge the jury charge. The Seventh Circuit in *Russell v. National Railroad Passenger Corporation*, 189 F.3d 590, 596 (7th Cir. 1999), also reviewed the adequacy of a jury charge on mitigation, holding that the jury charge was both properly given to the jury and adequate.

The remaining cases cited by Petitioner likewise are not only not inconsistent with the decision below, but support the exclusion of certain evidence of other possible employment when it is irrelevant to mitigation. In *Schneider v.*

National Railroad Passenger Corporation, 987 F.2d 132 (2d Cir. 1993), the jury was charged on mitigation. The Second Circuit held that district court did not err by preventing defendant in its summation from arguing that plaintiff failed to mitigate her damages by accepting an alternative job offered by defendant. *Id.* at 136. On a record that parallels that in this case, the court noted defendant failed to satisfy its burden of showing *that plaintiff could have mitigated her damages*. The court concluded that the burden was not met since there was evidence that plaintiff was not capable of full-time employment. *Id.* The *Schneider* court's decision is in complete accord with the decision in this case. In both cases, the jury was properly charged on mitigation, and the appellate court agreed that certain evidence was not relevant to mitigation and therefore inadmissible. In *Schneider*, it was plaintiff's failure to accept a job offer. In this case, it was Mr. Nast's income from his seasonal side business that he operated before and after the accident.

In *Wilson v. Union Pacific Railroad Company*, 56 F.3d 1226 (10th Cir. 1995), the trial court expressly refused to instruct the jury on mitigation since there was no evidence in the record that appropriate jobs were available to plaintiff. *Id.* at 1232. The Tenth Circuit held that it was within the trial court's discretion to conclude that there was insufficient evidence to justify a jury charge on mitigation. *Id.* The decision in *Wilson* further supports the discretion of the Trial Court to exclude evidence when it is immaterial and/or irrelevant to mitigation.

Petitioner also cites *Bissett v. Burlington Northern Railroad Company*, 969 F.2d 727 (8th Cir. 1992), in which, contrary to Petitioner's mistaken contention, the *Bissett* court concluded that information relevant to mitigation was properly admitted and that plaintiff had waived his challenge to a mitigation instruction. *Id.* at 730-731.

In contrast with these decisions, the adequacy of the trial court's jury charge on mitigation is not an issue in this

case. Here, the jury was charged on mitigation — a fact that Petitioner curiously omits to mention in the Petition. There is no issue as to the adequacy of that charge. The cases Petitioner cites do not support a conflict between the federal circuit courts and the Pennsylvania court below. Moreover, Petitioner points to no other conflict between the federal circuit courts and any other state appellate court.

F. The Question Is Not Sufficiently Important to Warrant This Court's Review.

Petitioner offers no compelling reason to grant the Petition. The actual question involves an evidentiary decision by a state intermediate appellate court regarding admissibility of particular evidence, which is governed by state law, and subject to trial court discretion. The Superior Court Panel's casual, almost offhand, remark with respect to mitigation, whether accurate or not, was not necessary to its decision and did not specifically address any issue of interpretation of the FELA. Petitioner cites not one other allegedly conflicting Pennsylvania appellate decision relating to the issue of mitigation in FELA cases.

The Supreme Court of Pennsylvania did not consider the issue sufficiently important to grant review, and the question does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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